No. 87-1166

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

RITA L. MENDEZ,
Petitioner,

vs.

IGNACIO MENDEZ,
Respondent.

On Writ of Certiorari to the
Florida District Court of Appeal, Third District

MOTION AND BRIEF OF *AMICUS CURIAE* WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF *AMICUS CURIAE* WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Watchtower Bible and Tract Society of New York, Inc., (Watchtower) hereby moves the Court for leave to file the accompanying brief *amicus curiae* in support of Petitioner's petition for writ of certiorari. Petitioner has given Watchtower written consent to file a brief *amicus curiae* but Respondent has not, thereby necessitating this motion. Copies of the letters showing Petitioner's consent and Respondent's refusal have been filed with the Clerk.

Watchtower Bible and Tract Society of New York, Inc., a not-for-profit religious corporation, is the parent

organization of the over 1,788,000 Jehovah's Witnesses and their associates in the forty-eight contiguous states. Petitioner is one of Jehovah's Witnesses. She has asserted that in a child custody dispute, speculation about the allegedly adverse effects of her religion on the cultural normalcy of her then-three-year-old daughter was the primary issue and resulted in a custody award to her ex-husband, the Respondent herein. Watchtower is therefore greatly interested in the religious freedom issues presented in this case.

As the parent organization of Jehovah's Witnesses in the United States, Watchtower has a broad perspective of the religious opposition faced by Witness parents in child custody and visitation disputes. From February 1987 to January 1988, Watchtower received inquiries from over 1,030 Jehovah's Witnesses in the United States who were facing religion-based attacks in child custody or visitation disputes.[1] Watchtower thus has a unique understanding of the extent of this problem for Jehovah's Witnesses.

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[1] The extent of this problem for Jehovah's Witnesses has been noted by others. One writer observed that "Jehovah's Witnesses seem to have been connected with over half the reported litigation" in which a parent's religion was attacked in a child custody dispute. 1 J. Atkinson, *Modern Child Custody Practice* § 4.35 (1986). Further corroboration is seen in a general annotation on the subject of religion in child custody and visitation cases. *See* Annotation, *Religion as a Factor in Child Custody and Visitation Cases*, 22 A.L.R.4th 971 (1983 & Supp. 1987). In this annotation, Jehovah's Witnesses are the only religious group to have a section devoted exclusively to cases involving members of their faith. *Id.* § 9.

For these reasons, Watchtower asks for this Court's leave to file its brief *amicus curiae.*

Respectfully submitted,

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Interest of *Amicus Curiae*

The interest of the Watchtower Bible and Tract Society of New York, Inc., is set forth in Watchtower's accompanying motion for leave to file this brief.

Statement of the Case

The decisive factor in the trial court's award of custody in this case was the Petitioner mother's 'deviant,' 'non-mainstream,' 'non-Western' religion. A19,

A21, A22, A23.[1] Despite the testimony of a psychiatrist and two psychologists (the "experts") that Petitioner's then-three-year-old daughter was extremely attached to her mother, A19, A20, A21; that there was no substitute for the relationship between the mother and the daughter, A21, A23, A24; that the mother was the child's primary parent figure, A19; that the mother was the one who, since the child's birth, had attentively cared for the child's physical and pyschological needs, A19, A21; and that leaving the child with the mother would have 'safeguarded what had already been working and proven to be a healthy relationship between the mother and her daughter,' A21, the trial court placed custody with the Respondent father, a man whose work regularly required him to be away from home. A21.

By the trial court's own words, *see* A3, A24-A25, its award of custody was based on the experts' testimony that, notwithstanding all their undisputed nonreligious evidence favoring the mother as the custodial parent, the mother's refusal to modify or compromise her 'deviant,' 'non-mainstream,' 'non-Western' religious beliefs rendered her less fit as a custodial parent than the father. A22, A23, A24. The Florida District Court of Appeal affirmed this award of custody because, in its view, the trial court did not abuse its discretion. A8. The District Court of Appeal implicitly found that the trial court's ruling was not contrary to the child's "best interests" and did not turn "solely" on the issue of the mother's

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[1] References are to the Appendix of Petitioner's Petition for Writ of Certiorari, *Mendez v. Mendez*, _ So. 2d _ (Fla. Dist. Ct. App. 1987), *petition for cert. filed*, 56 U.S.L.W. 3501 (U.S. Jan. 11, 1988) (No. 87-1166).

religion but rather was supported by "ample competent evidence." A8.

The assertion that the trial court's order was amply supported by nonreligious evidence and that religion was not the determinative factor ignores the fact that the mother's religion was by far the single major issue at trial. It also ignores the fact that the trial court expressly relied on the testimony of the experts in his award of custody, A3, A24-A25, notwithstanding the fact that all three experts and the guardian ad litem recommended or indicated that they would recommend the mother as the custodial parent provided she modify or abandon her religious beliefs. A20, A23, A24.

Reasons for Allowance of Writ

The central issue underlying the petition for writ of certiorari is the extent to which the First Amendment Religion Clauses allow courts to examine and rely on the religious beliefs of divorced parents when making awards of child custody or fixing conditions of visitation. For purposes of the petition for writ of certiorari, the basic issues are: (1) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody and visitation disputes, has reached a result that conflicts with the decisions of other state courts of last resort; (2) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody and visitation disputes, has decided important questions of federal constitutional law that have not been but should be settled by this Court; or (3) whether the court below, in deciding when and how the First Amendment allows a parent's religion to be a factor in custody and visitation disputes,

has decided questions of federal constitutional law in conflict with applicable decisions of this Court.

I.

State Courts of Last Resort Are in Conflict over the First Amendment Limitations on the Role of Religion in Child Custody Disputes

The Florida District Court of Appeal, a state court of last resort for purposes of the *Mendez* case, *see* FLA. R. APP. P. 9.030(a)(2)(A)(iv), has decided questions of federal constitutional law in conflict with the decisions of other state courts of last resort. The federal constitutional questions necessarily decided in *Mendez* were:

> (1) Does the Free Exercise Clause of the First Amendment prohibit a trial court from denying custody to a parent on the basis of that parent's religion when there has been no clear and affirmative showing of immediate and substantial harm to the child because of the parent's religion?
>
> (2) Does the Free Exercise Clause of the First Amendment prohibit a trial court from ordering a parent to suppress her religious activities in the presence of her child when there has been no clear and affirmative showing of immediate and substantial harm to the child because of the parent's religion?
>
> (3) Does the Establishment Clause of the First Amendment prohibit a trial court from making an award of child custody on the basis of religion when the child has no preference for any religion?
>
> (4) Does the Establishment Clause of the First Amendment prohibit a trial court from ordering a noncustodial parent to shield her child from all religions, including the noncustodial parent's, which are different from the custodial parent's religion, when the child has no preference for any religion?

The Florida District Court of Appeal's affirmance of an order denying custody and suppressing religious activity on the basis of one parent's religion when there has been no clear and affirmative evidence of immediate

and substantial harm to the child conflicts with the First Amendment free exercise protection construed by other state courts of last resort. *Osier v. Osier*, 410 A.2d 1027, 1030-31 (Me. 1980); *Hanson v. Hanson*, 404 N.W.2d 460, 463-64 (N.D. 1987); *Munoz v. Munoz*, 79 Wash. 2d 810, 813-15, 489 P.2d 1133, 1135 (1971); *see also Mentry v. Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983); *In re Marriage of Hadeen*, 27 Wash. App. 566, 619 P.2d 374 (1980).

In addition, the Florida District Court of Appeal's affirmance of an order awarding custody on the basis of religion and enjoining the noncustodial parent from 'exposing' her three-year-old child to any religious "practices, attendances, teachings or events . . . in any way inconsistent" with the custodial parent's religion when the child had no religious preference, A2, conflicts with Establishment Clause limitations construed by other state courts of last resort. *Bonjour v. Bonjour*, 592 P.2d 1233, 1241-44 (Alaska 1979); *Sanborn v. Sanborn*, 123 N.H. 740, 747-49, 465 A.2d 888, 893-94 (1983); *see also Zucco v. Garrett*, 150 Ill. App. 3d 146, __, 501 N.E.2d 875, 880 (1986).

In affirming the trial court's order, the Florida District Court of Appeal has contributed to the interstate confusion over the limitations, if any, the First Amendment places on trial courts when making awards of child custody or setting terms of visitation. Although all these courts supposedly observe the same federal constitutional standards, the federal constitutional protection afforded a parent's religious freedom in child custody and visitation disputes varies drastically from state to state. Es-

pecially if the parent is a member of a 'non-mainstream' religious minority, the extent of his freedom from court-imposed religious restrictions depends on his state of residence despite the presumably constant protection of the First Amendment.

An individual's federal constitutional rights should not hinge on a factor as inapposite and fortuitous as his place of residence. The conflicting, inconsistent results achieved by the state courts in their construction of the Federal Constitution's Religion Clauses in child custody and visitation disputes can only be set straight by this Court.

II.

The Court Below Has Decided Important Questions of Federal Constitutional Law that Have Not Been But Should Be Settled by this Court

The importance of religious free exercise and freedom from state advancement or suppression of particular religions needs no elaboration. Child custody cases such as *Mendez* bring the individual's religious freedom into the direct and immediate control of the state trial court judge. Under what circumstances, if any, does the First Amendment allow a trial court judge to deny a parent custody because of her religion? Under what circumstances, if any, does the First Amendment allow a trial court judge to restrain a parent's religious practices during visitation with her child? Under what circumstances, if any, does the First Amendment allow a trial court to favor one religion over another religion or no religion in a child custody dispute? These were the important federal constitutional questions necessarily decided by the Florida District Court of Appeal.

The United States Supreme Court has never addressed these questions in the setting of child custody or visitation, a setting in which state trial courts operate with wide-ranging discretion in pursuit of the child's "best interests." *Cf. Bellotti v. Baird*, 443 U.S. 622, 655-56 (1979) (Stevens, J., concurring) (best interest standard "provides little real guidance to the judge"). When and how this often highly subjective pursuit is tempered by the commands of the Federal Constitution are questions peculiarly suited to the mission of this Court.[2] If fundamental rights guaranteed to all persons by the Federal Constitution are being needlessly violated out of a reverance for the child's "best interests" that ignores First Amendment principles, this Court should correct the error.

III.

The Court Below Has Decided Questions of Federal Constitutional Law in Conflict with the Applicable Decisions of this Court

Although this Court has never ruled on Free Exercise and Establishment Clause questions in the context of child custody or visitation, there is no lack of guidance from the analysis the Court has applied in many First Amendment religion cases. The decisions of this Court show that an individual's right of religious free exercise is a fundamental constitutional right that precedes any

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[2] This is especially so in view of the "domestic relations exception" to the jurisdiction of the lower federal courts. *See In re Burrus*, 136 U.S. 586 (1890). *See generally* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3609, at 477-80 (1984).

interest of the state.[3] Any state-imposed burden on this fundamental right is subject "to strict scrutiny and [can] be justified only by proof by the State of a compelling interest." *Hobbie v. Unemployment Appeals Commission*, 107 S. Ct. 1046, 1049, 94 L. Ed. 2d 190, 197-98 (1987). Even upon proof of a compelling state interest, the state can justify an inroad on religious liberty only by showing that it is the least restrictive means of achieving the state interest. *Thomas v. Review Board*, 450 U.S. 707, 718 (1981).

While the state certainly has a compelling *parens patriae* interest in the welfare of children caught in the midst of custody disputes, *cf. Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972), invocation of the child's "best interests" does not mean First Amendment free exercise analysis requiring strict scrutiny and least restrictive means is abandoned. If a trial court's pursuit of the child's "best interests" burdens a parent's free exercise of religion, the court's actions must satisfy the rigors of free exercise analysis.

> Where the state conditions receipt of an important benefit . . . because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Board, 450 U.S. 707, 717-18 (1981).

The "important benefit" controlled by the state in the *Mendez* case was a nurturing mother's custody of her

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[3] The First Amendment Free Exercise Clause applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

three-year-old daughter. To condition the receipt of such an "important benefit" on a parent's "willingness to violate . . . cardinal principle[s] of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

There can be no question in the *Mendez* case that the state placed a heavy burden on Rita Mendez's free exercise of religion. Rita was forced to choose between following her religion, and thereby forfeit the custody of her child, or abandoning her religion, and thereby gain the custody of her child. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against" members of 'non-mainstream' religious minorities. *Id.* at 404. By denying Rita Mendez the custody of her child because she would not abandon, modify or compromise her 'deviant,' 'non-mainstream,' 'non-Western' religious beliefs, the trial court used its state-given power to exact a dear price for religious freedom.

Since everyone agrees that the welfare of minor children is a state interest of the highest order, the real question is not whether the state's interest is compelling but whether a parent's religious beliefs and practices actually threaten that state interest. This is where the court below erred; it failed to apply the strict-scrutiny and least-restrictive-means analyses required by this Court's First Amendment Free Exercise Clause decisions. In awarding custody to Rita Mendez's ex-husband, the trial court relied on mental health experts' hypotheses about vague and distant "adverse" effects Rita's three-year-old daughter might suffer because of Rita's 'deviant,' 'non-mainstream,' 'non-Western' religion. Does the state have a compelling *parens patriae* interest in ensur-

ing a "mainstream," "Western," 'non-deviant' upbringing for the children of divorced parents? If so, is total suppression of a noncustodial parent's religious free exercise during visitation the least restrictive means of protecting that state interest?

But for their unfavorable opinions about Rita Mendez's religion, all the mental health experts and the guardian ad litem agreed that Rita should have been made the custodial parent. While the experts were entitled to their private opinions and prejudices about Rita's religion, the trial court, acting on behalf of the state, was not free to adopt such speculative, discriminatory thinking behind the broad discretionary veil of the child's "best interests." As this Court said in a child custody case in which the trial court adopted the private racial prejudice of one of the parties:

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, J., dissenting)). The same should apply to private religious prejudice even when presented in the guise of "expert" testimony.

From the Establishment Clause[4] side of the question,

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[4] The First Amendment Establishment Clause applies to the states through the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

the court below failed to apply this Court's well-settled Establishment Clause analysis before it affirmed a custody order that favored the religion of one parent over that of the other. What secular purpose, having an effect that neither principally nor primarily advances nor inhibits religion, and that does not foster excessive entanglement with religion, is accomplished by an award of custody based on a parent's religion when a child is too young to have any religious preference? *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *cf. Bonjour v. Bonjour*, 592 P.2d 1233, 1240 n.14 (Alaska 1979); *Munoz v. Munoz*, 79 Wash. 2d 810, 815, 489 P.2d 1133, 1136 (1971); *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (1958). Unless speculation about the advantages of a parent's "Western," "mainstream," 'non-deviant' religion to a child who has no religious preference suffices as a valid secular purpose, the award of custody in *Mendez* patently served a purpose that was primarily religious.

In addition, a religion-based award of custody unavoidably has a principal effect of advancing the religion of one parent while inhibiting the religion of the other. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The signal from *Mendez* to parents preparing for custody disputes is to abjure any association with 'non-mainstream,' 'non-Western,' 'deviant' religions and to present the court with the most wholesome, all-American religion they can come up with.

Finally, excessive entanglement with religion cannot possibly be avoided in a quest to establish which parent practices the more "mainstream," "Western," 'nondeviant,' and, therefore, more 'beneficial' religion. The transcript of the *Mendez* trial provides a sorry but illustrative example of the type of religious inquisition necessitated by such a quest. And once the 'harmful' and 'beneficial' features of the parents' religions have been adequately established, the court must continue its religious entanglement by means of an enforceable order that will 'protect' the child from the deleterious effects of the noncustodial parent's religion.

In *Mendez*, the court ordered:

> The Wife shall not expose or permit any other person to expose the minor child to any religious practices, attendances, teachings or events which are in any way inconsistent with the religious teachings and practices of the Catholic religion. Nor shall the wife preclude the child from engaging in any activity which is permitted by the Catholic religion.

A2-A3. How will the court enforce this order unless it knows what the practices, attendances, teachings, events, and activities of the Catholic religion are? A threshold difficulty in gaining such knowledge is determining what is meant by "the Catholic religion." Does this mean Catholic doctrine as articulated by the Pope, does it mean the teachings of the American Catholic church, or does it mean the beliefs of the many people who consider themselves good Catholics but who disagree with both the Pope and American church leaders on what they believe God expects of them? The differences between the Papacy, the American Catholic church, and the average American Catholic are substantial. This is simply one aspect of the entanglement engendered by the *Mendez* order.

Without applying basic Free Exercise or Establishment Clause analysis, the court below has affirmed a custody order that burdens Rita Mendez's religious freedom and advances a particular religion for no secular purpose. The Florida District Court of Appeal has thereby made decisions of federal constitutional law in conflict with the applicable decisions of this Court.

Conclusion

Amicus curiae Watchtower Bible and Tract Society of New York, Inc., urges this Court to grant the writ of certiorari and address the serious invasions of First Amendment rights typified by the award of custody in this case.

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